

**BEFORE THE POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001**

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**Statutory Review of the System for  
Regulating Rates and Classes for  
Market Dominant Products**

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**Docket No. RM2017-3**

**COMMENTS OF PITNEY BOWES INC.  
(February 3, 2020)**

Pitney Bowes Inc. (Pitney Bowes) respectfully submits these comments in response to Order No. 5337, the Postal Regulatory Commission's (Commission) December 5, 2019, Revised Notice of Proposed Rulemaking (RNPRM).

**I. INTRODUCTION AND SUMMARY**

These comments address: (1) the Commission's proposed revisions to the workshare regulations, (2) the proposed changes to the Commission's procedural rules governing the rate adjustment filings, and (3) the proposed changes to the Commission's substantive review of rate adjustment filings.

The Commission's proposed revisions to the workshare regulations are improvements and should be adopted with slight modifications to promote efficiency. The Commission should adopt a two-part rule for workshare discounts set below costs avoided. The first element of the rule is that all workshare discounts must be moved ever closer to full Efficient Component Pricing (ECP) rates. The second element of the rule is that the Postal Service must obtain a waiver for any workshare discount that is not moved closer to full ECP rates. The waiver process should be strictly enforced and subject to limitation. Consistent with this approach the 85 percent passthrough floor should be included as a limitation on the waiver process, not as an

exception to the general rule requiring the Postal Service to set workshare discounts ever closer to ECP.

The proposed modifications to the procedural requirements for rate adjustment filings are substantially similar to the initial proposal. These proposals will improve procedural regularity and transparency and should be adopted.

The newly proposed revisions to the substantive standards of review of rate adjustment filings should be reconsidered because the proposed change would reduce transparency and accountability in the rate setting process.

## **II. DISCUSSION**

### **A. The Proposed Revisions to the Workshare Rules are Improvements and Should be Adopted with Slight Modifications to Maximize Incentives to Reduce Costs and Improve Efficiency Consistent with Objective 1.**

In the initial phase of this proceeding, the Commission held that while the Postal Service had the pricing authority under the modern rate system to set workshare prices to maximize incentives to reduce costs and improve efficiency, it had not consistently exercised that authority.<sup>1</sup> The Commission further concluded that the Postal Service's failure to use its pricing flexibility to maximize workshare discounts and incentives "may have harmed operational efficiency within the postal system because the Postal Service may have processed more mail than it otherwise would have if efficient price signals were sent."<sup>2</sup> Recent price adjustments confirm that inefficient pricing of workshare discounts is an ongoing issue. Accordingly, the

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<sup>1</sup> See Docket RM2017-3, Order No. 4257, Order on the Findings and Determination of the 39 U.S.C. § 3622 Review (Dec. 1, 2017), at 139, 216-19.

<sup>2</sup> *Id.* at 218.

Commission properly exercised its legal authority to establish clear regulatory standards for workshare discounts.<sup>3</sup>

The Commission proposes to adopt the “do no harm” principle.<sup>4</sup> Changes in workshare discounts must improve efficiency by moving closer to ECP, i.e., workshare discounts are set equal to the costs avoided by the Postal Service for not providing the applicable service, resulting in a passthrough of 100 percent. The Commission proposes to prohibit changes that make workshare discounts less efficient by moving away from ECP, except in certain limited circumstances.

The principles-based approach proposed in the RNPRM is theoretically sound and fully consistent with the relevant statutory objectives and factors. A rule requiring that all workshare discounts must be moved successively closer to ECP is consistent with the pricing and operational components of Objective 1 and the just and reasonable requirements of Objective 8 (by preventing exclusionary pricing). The revised proposed rules implementing this principles-based approach also take into account Factors 5 and 12, respectively, by more fully recognizing the value of the work performed by mailers and mail service providers in reducing the costs and improving the efficiency of the Postal Service.

In the interest of flexibility the revised rules provide both a waiver process that would allow the Postal Service to deviate from ECP pricing with adequate justification and a safe harbor for workshare discounts set between 85 percent and 100 percent of avoided costs. The 85 percent stand-alone safe harbor is unnecessary and will invite inefficient pricing. The workshare regulations should be simplified and tightened. As a general rule, the Postal Service must move

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<sup>3</sup> See 39 U.S.C. § 503; 39 U.S.C. §§ 3622(a) and 3622(d)(3). As the Commission appropriately notes, even if a court later determines that the Commission’s authority under section 3622(d)(3) is more limited, “it has multiple sources of authority to support addressing workshare discounts in this proceeding.” RNPRM at 57-58.

<sup>4</sup> *Id.* at 206.

all workshare discounts closer to ECP as required by Objective 1. The Postal Service may seek a waiver from the general rule, but the waiver process should be strictly enforced and subject to a lower bound. Specifically, the 85 percent passthrough floor should be included as a limitation on the waiver authority, not as an exception to the general rule requiring the Postal Service to set workshare discounts closer to ECP.

1. The waiver provisions provide sufficient flexibility, but must be construed narrowly.

If properly implemented, the proposed waiver provisions will provide the Postal Service with sufficient pricing flexibility while promoting the overriding goal of increased efficiency. The waiver process provides the Postal Service with the advance opportunity to demonstrate why it should not be required to set specific workshare discounts consistent with or closer to ECP. Waivers for workshare discounts set below avoided costs are appropriately limited to instances where the Postal Service can make an adequate showing that moving a discount closer to ECP would impede operational efficiency. The waiver provisions also incorporate the existing statutory exceptions under section 3622(e) for excessive workshare discounts. The structure of the waiver proposal suggests that the Commission anticipates that such requests will be infrequent and must be fully justified. Strict enforcement of the waiver provisions will be essential to realizing the stated goal of the proposed workshare regulations - reduced costs and increased pricing and operational efficiency.

The flexibility to deviate from ECP pricing under the waiver provisions should be limited. Specifically, the proposed exception for low workshare discounts under proposed 39 C.F.R. 3010.284(g) would be improved by adding a lower bound on discounts set below costs avoided. An 85 percent passthrough floor would be appropriate for this purpose. For the reasons discussed below, an 85 percent passthrough floor is too permissive as a general rule, but would

be appropriate as a lower bound on the waiver authority to ensure the waiver process is not used to justify “a particularly inefficient pricing practice.”<sup>5</sup> Accordingly, Pitney Bowes recommends that the Commission revise proposed 39 C.F.R. 3010.286(g) to add a lower bound on discounts set below avoided costs under the waiver authority as follows:

**§ 3010.286 Application for waiver.**

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(g) For a proposed workshare discount that would be set below the cost avoided by the Postal Service for not providing the applicable service, the application for waiver shall be granted only if setting the workshare discount closer or equal to the cost avoided by the Postal Service for not providing the applicable service would impede the efficient operation of the Postal Service. A waiver may not be used to move a workshare discount set above 85 percent of costs avoided to a rate that passes through less than 85 percent of the costs avoided by the Postal Service for not providing the applicable service.

2. The 85 percent passthrough floor is unnecessary and inconsistent with Objective 1 and with the Commission’s principles-based approach.

There is no need for an 85 percent passthrough floor as a general limitation to the rule that all workshare discounts must be moved closer to full ECP rates. The 85 percent passthrough floor is too permissive. It is inconsistent with the mandate in Objective 1 to “maximize incentives to reduce costs and efficiency.”<sup>6</sup> As the Commission correctly observes “Objective 1’s goal of pricing efficiency could be achieved ‘when prices adhere as closely as practicable’ to ECP.”<sup>7</sup> An 85 percent passthrough floor does not maximize incentives to reduce costs or increase efficiency and does not encourage prices to be set as close as “practicable” to full ECP rates. The 85 percent passthrough floor that was included as the lower band in the Commission’s previous proposal was widely understood as the dividing line between discounts set “substantially below” avoided costs and those minimally-acceptable. Creating a safe harbor

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<sup>5</sup> *Id.* at 200.

<sup>6</sup> 39 U.S.C. § 3622(b)(1).

<sup>7</sup> RNPRM at 175.

for minimally acceptable discounts is inconsistent with Objective 1. The Commission's statement that it will continue to encourage the Postal Service to improve discounts set at the 85 percent passthrough floor is a tacit acknowledgement that discounts set that far below avoided costs do not satisfy Objective 1.<sup>8</sup>

An 85 percent passthrough floor is also inconsistent with the Commission's stated "do no harm" principle. Unlike the general limitations for new workshare discounts or the exception for discounts that are incrementally improved by 20 percent or more, an 85 percent passthrough floor is not time-limited or transitional. A static 85 percent passthrough floor would allow inefficient pricing to remain over time. A safe harbor for discounts that pass through 85 percent of avoided costs provides no incentive for the Postal Service to move existing workshare discounts closer to ECP; thus, the 85 percent passthrough floor may also operate as a *de facto* price ceiling. As a result the 85 percent passthrough floor may prevent workshare discounts set substantially below avoided costs, but those benefits may come at the expense of systematic pricing and operational inefficiency. The principled goal of "do no harm" will be transmogrified into "allow some harm indefinitely." In view of the Commission's prior findings that the Postal Service failed to use its pricing authority to maximize pricing and operational efficiency, the Commission's assurance that it will "continue to encourage the Postal Service to improve the efficiency of workshare discounts that produce passthroughs between 85 percent and 100 percent[]" provides little comfort.<sup>9</sup> Clear regulatory standards are necessary to ensure increased pricing and operational efficiency consistent with Objective 1.

For example, assume a workshare discount is set at \$0.03, with a passthrough of 91 percent based on costs avoided of \$0.033. Under proposed rule 3010.284(e), even if the costs

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<sup>8</sup> See RNPRM at 200.

<sup>9</sup> *Id.*

avoided increase to \$0.034, it would be permissible for the Postal Service to reduce the discount to \$0.029 (85 percent) despite the fact that the adjustment moves the discount further from ECP rates. Consistent with Objective 1 and the Commission's principles-based approach, discounts that passthrough between 85 percent and 99 percent of costs avoided should be treated the same as all other discounts - they should be moved closer to full ECP rates unless there is adequate justification not to do so.

Accordingly, Pitney Bowes recommends that the Commission modify proposed 39 C.F.R. 3010.284 to delete the 85 percent passthrough floor as a general limitation, as follows:

**§ 3010.284 Limitations on discounts below avoided cost.**

- (a) No proposal to adjust a rate may set a workshare discount that would be below the cost avoided by the Postal Service for not providing the applicable service, unless at least one of the following reasons provided in paragraphs (b) through (ed) of this section applies.
- (b) The proposed workshare discount is associated with a new postal service, a change to an existing postal service, or a new workshare initiative.
- (c) The proposed workshare discount is a minimum of 20 percent more than the existing workshare discount.
- (d) The proposed workshare discount is set in accordance with a Commission order issued pursuant to § 3010.286.
- ~~(e) The percentage passthrough for the proposed workshare discount is at least 85 percent.~~

As modified above, the following two-part rule for workshare discounts set below costs would maximize incentives to increase efficiency: (1) all workshare discounts must be moved closer to full ECP rates, and (2) deviations from ECP rates will be granted only where the Postal Service can show via a waiver process that moving discounts toward ECP rates will impede operational efficiency. Waiver requests will be strictly enforced and subject to limitation. Consistent with this approach, the 85 percent passthrough floor should be included as a limitation on the waiver process, not as an exception to the general rule requiring the Postal Service to set workshare discounts ever closer to ECP.

**B. The Proposed Changes to the Notice and Timing of Rate Adjustment Proceedings are Improvements and Should be Adopted.**

The proposed procedural changes to the notice and timing aspects of rate adjustment proceedings in the RNPRM retain the “substance and structure” of the initial proposals.<sup>10</sup> Pitney Bowes continues to support the extension of the minimum notice period for market dominant rate adjustment filings from 45 to 90 days and the proposed modifications to the time periods for public comment and for the Commission’s internal deliberations.<sup>11</sup> The changes as to the required notice largely conform to the Postal Service’s current practice. The proposed extension to the public comment period will facilitate more meaningful participation by interested parties. The extension of the Commission’s review period will enable a more thorough review by the Commission and, thus, will facilitate improved accountability consistent with Objectives 2 and 6. The revisions to clarify Commission responses to incomplete filings are likewise improvements that will help facilitate the administration of the rate making process.<sup>12</sup>

**C. The Proposed Changes to the Commission’s Substantive Review of Rate Adjustment Filings Should be Reconsidered.**

In the final paragraph of the discussion on changes to the procedural rules the Commission announces that it “proposes to discontinue addressing the objectives and factors in individual rate adjustment proceedings.”<sup>13</sup> This is a significant change in the Commission’s substantive review of rate adjustment filings. The Commission should reconsider the proposed change in consideration of the Postal Accountability and Enhancement Act’s (PAEA) overriding goal of enhanced accountability and binding federal court precedent.

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<sup>10</sup> *Id.* at 238.

<sup>11</sup> *See id.*, Attachment A at 7-8, 12-13.

<sup>12</sup> *See id.*, Attachment A at 13-14.

<sup>13</sup> RNPRM at 240.



The RNPRM does not offer an explanation for the change, other than to state that “notwithstanding” the recent decision by the United States Court of Appeals for the District of Columbia (*Carlson v. Postal Regulatory Commission*, 938 F.3d 337 (D.C. Cir. 2019)) the Commission has the “authority to construe how to apply the provisions of 39 U.S.C. 3622, including paragraphs (b), (c), and (d)(3).”<sup>14</sup> In a footnote the RNPRM seeks to downplay the significance of the *Carlson* case by citing to language in the opinion where the Court stated “Congress left the Commission leeway to establish, through regulation, a process for considering the PAEA’s objectives and factors.”<sup>15</sup> But it does not follow that because the PAEA grants the Commission discretion in the application of the statutory objectives and factors that the Commission need not apply them at all. In fact, the *Carlson* court expressly rejected that reading when it held that it “recognize[s] that not every statutory factor and objective will be relevant to an individual rate assessment and that the weight accorded particular factors may therefore vary in each case. But that does not mean the Commission may simply disregard the objectives and factors when approving rate adjustments.”<sup>16</sup> The *Carlson* court further held that “[b]ased on the text and structure of the PAEA, we concluded the PAEA requires consideration of all relevant statutory objectives and factors as part of the regulatory process and does not authorize the Commission to defer evaluation of those objectives and factors until after it approves a rate change.”<sup>17</sup>

The statement in the footnote that the *Carlson* court “did not evaluate the Commission’s authority 39 U.S.C. § 3622(d)(3)” is unsupported.<sup>18</sup> Throughout the *Carlson* decision the Court states that its findings are “based on the text and structure of the PAEA” and compelled by the

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<sup>14</sup> RNPRM at 240.

<sup>15</sup> RNPRM at 240, n.328 (citing and quoting *Carlson v. Postal Regulatory Commission*, 938 F.3d 337, 344 (D.C. Cir. 2019)).

<sup>16</sup> *Carlson*, 938 F.3d at 344.

<sup>17</sup> *Id.* at 343.

<sup>18</sup> RNPRM at 240, n.328.

“statutory structure” and “framework.”<sup>19</sup> There is nothing in the *Carlson* decision to suggest that the court found the statute ambiguous; thus, the citation to *National Cable & Telecommunications Association v. Brand X Internet Services (Brand X)* is inapposite.<sup>20</sup> *Brand X* is relevant insofar as it affirms that an agency must provide a reasoned explanation for reversing a prior interpretation and that the lack of a reasoned explanation is arbitrary and capricious.<sup>21</sup> The standards for the Commission’s substantive review of rate adjustment filings have been in place since Order No. 43 established the regulations implementing the modern rate system under the PAEA. The Commission has not provided a reasoned basis for reversing its position here.

Additionally, the *Carlson* court specifically rejected the argument as “contrary to the plain language of the statute when read as a whole[,]” that consideration of the statutory objectives and factors can be deferred until the annual compliance review process or a complaint process because, among other reasons, captive rate payers would be denied any effective relief under 39 U.S.C. § 3681 if the rates were later determined to be unlawful.<sup>22</sup> The RNPRM does not address this issue at all.

The PAEA grants the Commission a unique role as an independent regulatory agency responsible for regulating the rates charged by the Postal Service to business and consumer mailers. The proposal to discontinue addressing the objectives and factors in individual rate adjustment proceedings is difficult to reconcile with the simultaneous grant of increased discretionary authority to the Postal Service to raise rates above the statutory price cap and with

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<sup>19</sup> *Carlson*, 938 F.3d at 343.

<sup>20</sup> See RNPRM at 240, n.328 (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (*Brand X*)).

<sup>21</sup> See *Brand X*, 545 U.S. at 981-82.

<sup>22</sup> *Carlson*, 938 F.3d at 350 (“[t]he statutory structure confirms the annual review and separate complaint process cannot provide a post-hoc rationalization of rate adjustments.”).

the overriding goals of the PAEA to promote enhanced accountability and transparency in the rate system.

For all these reasons, Pitney Bowes respectfully urges the Commission to reconsider its proposal to discontinue addressing the statutory objectives and factors in individual rate adjustment proceedings.

### **3. CONCLUSION**

The Commission properly exercised its legal authority to establish clear regulatory standards for workshare discounts. The proposed revisions to the workshare rules are improvements and should be adopted with modifications to maximize pricing and operational efficiency. The procedural changes for rate adjustment filings are also improvements and should be adopted as proposed. The proposed changes to the Commission's substantive review of rate adjustment filings should be reconsidered to ensure that transparency and accountability in the rate setting process are not inadvertently reduced.

Respectfully submitted:

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